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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1369

UNION PLANTERS NATIONAL BANK OF MEMPHIS,
Petitioner,

vs.

AZTEC PROPERTIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioner, Union Planters National Bank of Memphis ("the Bank"), prays that a writ of certiorari issue to review the decree of the Supreme Court of Tennessee entered in this case on January 12, 1976.

OPINIONS BELOW

The opinion of the Chancellor is contained in the decree, is unreported, and is printed in Appendix B hereto, *infra*, p. A3. The opinion of the Supreme Court of Tennessee, printed in Appendix B hereto, *infra*, p. A5, is reported in 530 S.W.2d 756 (Supreme Court of Tennessee 1975).

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Missouri Bank of Kansas City v. *Danforth*, (W.D.Mo. 1975) 394 F.Supp. 774, 782-3, and, therefore, national banks must be permitted to charge equivalent interest. Id. at 786-7. Accord: *Northway Lanes* v. *Hackley Union National Bank and Trust Co.*, (6th Cir. 1972) 464 F.2d 855; *Hiatt* v. *San Francisco National Bank*, (9th Cir. 1966) 361 F.2d 504; *Acker* v. *Provident National Bank*, (3d Cir. 1975) 512 F.2d 729.

The Court below found that the note at issue, assuming that the purchasing power adjustment constituted interest, called for interest at the rate of only 10.96% per annum. The decision below directly conflicts with 12 U.S.C. §85, and with federal law as expounded by this Court and the lower federal courts.

2. The decision below, extending the "Gold Clause" Statute to invalidate CPI clauses, goes far beyond the intent of Congress and decisions of this Court and, if left standing, will seriously jeopardize a vast array of modern economic relationships. 31 U.S.C. §463 states, in pertinent part:

> "Every obligation . . . shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender . . ."

The import of that language, as stated by this Court, is as follows:

> "This proscription embraced 'every provision' purporting to give an obligee a right to require payment in (1) gold; (2) a particular kind of coin or currency of the United States; or (3) in an amount of United States money measured by gold or a particular kind of United States coin or currency."

Guaranty Trust Co. v. *Henwood*, (1939) 307 U.S. 247, 252. Disregarding this Court's reading, the Court below held

it to be illegal "to vary the number of dollars which may be required to be paid in satisfaction of the debt" despite the fact that the CPI clause has nothing whatsoever to do with gold or a particular kind of United States money.

The "Gold Clause" Statute speaks of "every obligation," and has never been limited to those evidenced by promissory notes. See *Guaranty Trust Co., supra,* at 251-2. This Court has applied it to other sorts of obligations. *Norman* v. *Baltimore & Ohio RR Co.*, (1935) 294 U.S. 240; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, (1937) 300 U.S. 324. Yet the Court below interpreted the statute to apply *only* to promissory notes. (It did so presumably to avoid the obvious legitimacy of CPI clauses in an increasingly wide range of other financial transactions.)

The CPI has become an increasingly common measure for adjusting obligations to pay money, whether such obligations constitute salaries, rents, welfare payments, or whatever:

> "The Consumer Price Index is used widely by the general public to guide family budgeting and to understand what is happening to family finances. It is used extensively in labor-management contracts to adjust wages. Automatic adjustments based on changes in the index are incorporated in some wage contracts and in a variety of other types of contracts, such as long-term leases. In addition, the CPI is used as a measure of changes in the purchasing power of the dollar for such diverse purposes as adjusting royalties, pensions, welfare payments; and occasionally alimony payments. It also is used widely as a reflection of inflationary or deflationary trends in the economy." CCH Labor Law Reporter, 4 Labor Relations ¶ 7760.10.

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The decision below that CPI adjustments are prohibited by the "Gold Clause" Statute, if left standing, would invalidate all such arrangements. The result, based on the ascribed meaning of a federal statute totally at variance with the meaning ascribed to it by this Court, would be economic chaos.

Limiting such an unfortunate holding only to promissory notes directly contradicts this Court's decisions in *Guaranty Trust*, *Norman* and *Holyoke Water Power*, all *supra*. The court below simply ignored this Court's holding in *Guaranty Trust, supra*, that the statute applies to "*every* provision" (emphasis supplied), whether note, bond or lease. The court below forced the CPI adjustment clause into the proscription of the statute by further ignoring the "gold and particular kind of currency" limitation which this Court has declared Congress placed upon it. To avoid the economic chaos resulting from such a broad and unwarranted holding, the court below fashioned its own limitation, wholly without authority and directly in conflict with the clear line of decisions of this Court, by purportedly exempting all such provisions except those contained in promissory notes from the statute's reach. This federal question, vitally important to the economy of the nation and to the financial affairs of a majority of its citizens, was decided by the court below in a way which squarely conflicts with numerous prior decisions of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES W. MCDONNELL, JR.
Counsel for Petitioner

APPENDIX A

12 U.S.C. § 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the

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days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

31 U.S.C. § 463. Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

APPENDIX B

OPINIONS BELOW

Chancery Court Decree

(Filed December 6, 1974)

This matter came on to be heard upon cross-motions for summary judgment filed by each of the parties, the written stipulation of facts executed and filed by the parties, the pleadings and briefs filed by the respective parties, and arguments of counsel, based upon all of which the Court finds and concludes as follows:

1) There is no genuine issue as to any material facts;

2) The material facts are as contained in the stipulation filed herein and as admitted in the pleadings filed by the respective parties;

3) The only dispute between the parties is as to three purely legal questions, to wit: a) Is the note in question usurious under Tennessee law? b) Does the note in question contain a "Gold Clause" invalidated by 31 U.S.C. §463? and c) May a corporation legally waive its usury defense?;

4) The note in question is not usurious under Tennessee law;

5) The note in question does not contain a clause invalidated by 31 U.S.C. §463;

6) The question of corporate waiver of the usury defense is not determinative and, therefore, need not be decided;

7) Plaintiff is entitled to have the note fully enforced according to its terms, and is entitled to judgment as a matter of law;

8) Defendant is justly indebted to plaintiff in the amount of Five Hundred Dollars ($500.00), together with interest at the rate of Ten Percent (10%) per annum from August 13, 1974, until paid; and

9) Costs should be borne equally by the parties.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff have and recover from defendant the sum of Five Hundred Dollars ($500.00), together with interest thereon at the rate of Ten Percent (10%) per annum, until paid, each party to pay one-half of the costs, for all of which let execution issue.

To all of which defendant having respectfully excepted, and defendant having prayed an appeal from this Decree, said appeal is hereby granted, conditioned upon said appeal being perfected as required by law.

/s/ Wil V. Doran
Chancellor

Dated: 12-6-74

Opinion of the Supreme Court of Tennessee

(Filed October 27, 1975)

This is an action to recover on a promissory note. The facts are stipulated.

On July 12, 1974, Aztec Properties, Inc., executed a promissory note payable to Union Planters National Bank of Memphis in exchange for a $50,000.00 loan. The promisor agreed to pay the promisee $50,000.00, "in constant United States Dollars adjusted for inflation (deflation)" with interest at ten percent per annum. The adjusted principal was to be calculated according to a formula contained in the note, to wit:

> "Amount of principal due shall equal the amount of original principal multiplied by the consumer price index adjustment factor. This adjustment factor shall be computed by dividing the consumer price index at maturity by the consumer price index on date of borrowing. Said consumer price index numbers shall be for the most recent month available preceding borrowing and maturity dates. This consumer price index shall be the index not seasonably adjusted for all items as reported by the United States Department of Labor."

On maturity of the note Aztec Properties repaid to the bank $50,000.00, with discounted interest at the rate 9.875 percent, in the amount of $419.35 (which is an effective yield of 9.96% per annum), but the borrower refused to pay the additional "indexed principal" of $500.00 based on the inflation adjustment formula.

Whereupon, the bank sued Aztec Properties in Chancery Court for the "indexed principal" together with interest from maturity at the rate of ten percent per annum.

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Both parties filed Motions for Summary Judgment, the Chancellor holding in favor of the bank. Aztec Properties now appeals to this Court alleging that the Chancellor erred in granting the bank's Motion and in denying its own.

The first issue to be resolved is whether this note is usurious, i.e., whether it charges interest in excess of the legal rate of ten percent per annum. T.C.A. § 47-14-104. A defendant sued for money may avoid the excess over legal interest, by a plea setting forth the amount of the usury. T.C.A. § 47-14-112. Interest includes *all* compensation for the use of money. "Any payment to the lender in addition to the rate of interest legally permissible, whether called by the name of bonus or commission or *by any other name*, is usurious." (Emphasis added.) *Restatement Contracts*, § 526. Compensation is determined not by what the borower pays but by what the lender receives; thus, if the borrower is the beneficiary of a payment it will not be interest. *Silver Homes, Inc.* v. *Marx & Bensdorf, Inc.*, 206 Tenn. 361, 333 S.W.2d 810 (1960). Nor are expenses incident to making a loan and furnishing the lender with satisfactory security for its repayment compensation or interest. *Silver Homes, Inc.* v. *Marx & Bensdorf, Inc., supra.*

The note executed by Aztec Properties bears ten percent interest on its face; that interest has been paid and is not in issue here. The borrower claims that the "indexed principal" constitutes additional interest. The bank argues that the "indexed principal" equals the difference in value between the principal lent and returned, and is not extra compensation.

There being no Tennessee case law directly on point, both parties attempt to analogize the long series of "exchange of money" cases.

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One of the earliest of these cases was *Lawrence* v. *Morrison*, 9 Tenn. 444 (1830). In that case the borrower gave a note to Sullivan for $607.81½ in Tennessee bank notes, payable on December 25, 1825. Sullivan assigned the note to Lawrence. On December 24, 1825, the borrower executed a second note in exchange for the first note for the same sum payable in gold and silver on August 1, 1825 [sic]. After the second note fell due a suit was instituted to which the borrower plead usury averring that that $607.00 in bank notes was worth only $456.00 specie. The Court set guidelines for determining usury:

> "A jury in trying the case before us would . . . first enquire what was the value of the bank notes on the day the second note was given. If the sum found, compared with the amount of the note given for specie, fell so far short as to show that more than the rate of six per cent. per annum had been reserved, they might then infer that the whole amount was a device to cover usury. . . . In short, it would be for the jury to ascertain whether under all the circumstances, it was intended by the parties under color of supposing depreciated paper equal to specie, to cover a corrupt bargain against the statutes concerning usury." Id. at 446.

In *Weatherhead* v. *Boyers*, 15 Tenn. 545 (1835), Weatherhead borrowed a sum in Tennessee bank notes from Boyers and agreed to repay an equal nominal amount in specie or notes on the Bank of the United States. The latter were equal to gold or silver while the former were greatly under par. The Court looked beyond the devices and disguises of the parties to the substance of the transaction and found usury.

The Court reached the opposite result in *Turney* v. *State*, 24 Tenn. 407 (1844). In that case a contractor with

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the post office had an arrangement with the bank whereby he deposited eastern funds and gold and silver and received Tennessee bank notes of equal face value in exchange. The latter were only worth 92-93% of the former. The contractor also had the privilege of borrowing additional money from the bank up to twice the amount of his funds. Although the difference in value between the eastern funds and specie, on one hand, and the Tennessee bank notes, on the other, exceeded the legal maximum interest at that time (6%), the Court found no usury because the parties had no corrupt intentions. It pointed out that the notes received by the contractor "were notes of specie-paying banks, as sound or available, perhaps, to him and to others, in ordinary transactions, as eastern funds." Id. at 409.

The Court in *Turney* v. *State*, *supra*, relied heavily upon *United States* v. *Waggener*, 9 Peters 378, 9 L.Ed. 163 (1835). In *Waggener*, the borrower executed a promissory note for $5,000.00 and 6% interest per annum payable to the Bank of the United States in exchange for which he received $5,000.00 in Kentucky bank notes. At the time of the loan the Kentucky bank notes were circulating at a rate of thirty-three to forty percent depreciation below their nominal amounts. In response to the claim of usury the United States Supreme Court stated, "to constitute usury within the prohibition of law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement." Id. at 171. The Court concluded that the loan in *Waggener* was not per se illegal because the Kentucky bank notes might have been worth more to the parties than their marketable value at the time of the loan. If the parties bona fide estimate equivalent values in the credits

or commodities they are exchanging, there is no usury, said the Court.

In *Hamilton* v. *Moore*, 26 Tenn. 35 (1846), the complainant borrowed a sum of money in Alabama bank notes and sometime afterwards bound himself by a bill single to repay the face value of the loan in Tennessee bank notes. He later claimed that the bill single was usurious because Alabama bank notes were worth less than those of Tennessee. The parties agreed that they did not intend to commit usury and that the borrower said at the time that Alabama notes would be as valuable to him as Tennessee money. The Court relying on *Turney* v. *State, supra, found* no usury. It stated that "usury is not an inference of law, to be drawn from the mere inequality of value between the currency loaned and that stipulated to be paid for it, but, on the contrary, is a question of intention, to be made out by the proof of facts." Id. at 36.

In *Finley* v. *McCormick*, 53 Tenn. 392 (1871), the complainant lent the borrower $200.00 in gold, $150.00 in silver, and $200.00 in greenbacks, or United States currency, and the latter agreed to pay back the gold and silver or to pay $1.50 for every dollar in gold, and the difference in value of silver. The borrower argued that this was usurious. The Court concluded that it could "not judicially know the value of 'greenbacks,' so called, and for ought that appears on the face of the bill, the parties may have fairly estimated the difference in value between them and gold and silver, and the contract is, *prima facie*, lawful." Id. at 394.

Finally in *In re Mansfield Steel Corporation*, 30 F.2d 832 (E.D. Mich. 1929), a Canadian resident lent a Michigan corporation $88,000.00, primarily in Canadian money. The corporation in exchange executed a promissory note for that amount in American funds plus the maximum legal

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interest in Michigan. At the time of the loan Canadian money was worth less than American money, but the parties anticipated they would be at par by the time of repayment. Evidence of the parties' expectations was an important factor in the court's decision that they lacked the intention to lend money at usurious interest.

In our view these cases are fundamentally different from the case under consideration here. With the exception of the last case all occurred in a very particular historical context; they were decided at a time when different kinds of money with different values were in circulation. Faced with the problem of the interchange of this money the court concluded that usury should be ascertained according to the parties' intentions; thus, when the moneys exchanged pursuant to a loan are *different in kind* but *equal in value* in the honest judgment of the parties, the courts will not assume that a difference in their market value is hidden interest. It is important to note that except for *Mansfield, supra*, equality of value was evaluated in these cases as of the time of the loan or agreement to repay; in no case was the sum owing adjusted at the time of repayment according to fluctuations in value of the principal after it was lent. And in *Mansfield* the parties merely considered the projected fluctuation in value of the currency of repayment, not appreciation or depreciation in value of the principal loaned.

We have found no case holding that an intentional increase in the face value of the principal to account for inflation does not constitute interest. In practice the lender has long borne the risk of inflation in this state. The interest charged by a lender is not profit, strictly speaking, but compensation for the use of money and for bearing the risk that the borrower might not repay or the principal might depreciate in value. We accordingly hold that the "indexed principal" constitutes usurious interest.

The next question raised is whether the defense of usury, provided in T.C.A. § 47-14-112, is available to *corporate* borrowers. The usury statutes of many states exempt corporations from their protection. See Hershel Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53 Va.L.Rev. 327 at 346 et seq. (1967). Tennessee, however, has never adopted such a statute nor have its courts recognized a corporate exclusion. But the Bank argues that the Legislature has granted corporations organized under Tennessee law the right to borrow at whatever interest rate they choose. T.C.A. § 48-402 provides:

> "Each corporation shall have power:
>
> "(g) To make contracts and, subject to such limitations, if any, as may be contained in the charter, to incur liabilities, *borrow money at such rates of interest as the corporation may determine*, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage, pledge or otherwise." (Emphasis added.)

In our opinion this statute merely enables corporations to borrow money at such rates as are *permitted by law*. The Legislature has no power to authorize corporations to lend or borrow at any interest rate exceeding the uniform and equal rate fixed by general law. *McKinney* v. *The Memphis Overton Hotel Company*, 59 Tenn. 104 (1873). Nor can this rate exceed ten percent per annum. *Constitution of Tennessee*, Article 11, § 7.

Aztec Properties executed a written waiver of the defense of usury at the time the note was signed and the Bank relies upon this waiver. We find no merit in this argument because the consent or cooperation of the one paying the usurious interest is immaterial. *Providence*

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A.M.E. Church v. *Saver*, 45 Tenn. App. 287, 323 S.W.2d 6 (1958).

Even if the "indexed principal" were not considered to be interest, we are of the opinion that as employed in this case the device of an "indexed principal" could not withstand analysis under the Joint Congressional Resolution of June 5, 1933, popularly referred to as the "Gold Clause" Resolution.

Congress made its intention extremely clear in this resolution, in which it stated:

> "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." 31 U.S.C.A. § 463.

We are not concerned in this case with the exchange of currencies upon an international market, nor does the case involve the sale of any commodity. In this case a domestic customer borrowed funds from a national bank in a principal amount expressed in and repayable in United States dollars. It would be contrary to the national policy, as expressed by the Congress and as interpreted in several cases by the United States Supreme Court, to permit a lender to require of a borrower a different quantity or number of dollars from that loaned, insofar as the principal amount is concerned. In *Guaranty Trust Company, Trustee* v. *Henwood, Trustee, et al.*, 307 U.S. 247, 252, 59 S. Ct. 847 (1939), the United States Supreme Court said:

> "Having thus unmistakably stamped illegality upon both outstanding and future contractual provisions designed to require payment by debtors in a frozen money value rather than in a dollar of legal tender

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current at date of payment, Congress—apparently to obviate any possible misunderstanding as to the breadth of its objective—added, with studied precision, a catchall second sentence sweeping in 'every obligation', existing or future, 'payable in money of the United States' irrespective of 'whether or not any such provision is contained therein or made with respect thereto.' The obligations hit at by Congress were those 'payable in money of the United States.' All such obligations were declared dischargeable 'upon payment dollar for dollar, in any coin or currency [of the United States] which at the time of the payment is legal tender for public and private debts.' "

See also *Norman* v. *Baltimore & Ohio Railroad Company*, 294 U.S. 240, 55 S. Ct. 407 (1935); *Holyoke Water Power Company* v. *American Writing Paper Company*, 300 U.S. 324, 57 S. Ct. 485 (1937).

Accordingly, even if the reserved interest in the present case were only five percent, or some other rate clearly free from any question of usury, we are of opinion that a national or state banking institution would not be authorized to "index" the principal amount of money loaned to a domestic customer on a promissory note, so as to vary the number of dollars which may be required to be paid in satisfaction of the debt.

It is recognized, of course, that "indexing" is a current and very legitimate concept in modern business transactions. Nothing in this opinion should be taken to suggest that there is an impropriety in measuring future rentals by a consumer price index, or some comparable standard, in leasing agreements. Nor is there anything improper in computing future wages or salaries by such an index in collective bargaining or employment contracts. As long as there is a national currency, however, which

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by law is legal tender for the payment of public and private debts, we hold that the indexing device cannot properly be applied to the principal of a debt evidenced by a promissory note payable in that currency.

Accordingly, the judgment of the Chancellor is reversed, all costs taxed against the appellee, Union Planters National Bank of Memphis.

/s/ Ray L. Brock, Jr.
Brock, J.

Concur:

Fones, C.J.
Cooper, J.
Henry, J.
Harbison, J.